In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1797

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a Corporation,

Petitioner,

vs.

RONALD DEAN JOHNSON

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of California, First Appellate District

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To the Honorable Warren Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

This is an action by a railroad worker against his employer for damages for personal injuries suffered in the course of his employment. The action was brought by respondent Ronald Dean Johnson (hereinafter "respondent") against petitioner Southern Pacific Transportation Company (hereinafter "petitioner") under the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) and the Federal Safety Appliance Act (45 U.S.C. § 1 et seq.). Pur-

suant to a jury verdict, the Superior Court of California (hereinafter "the trial court") entered judgment for respondent in the amount of $460,587.13. The judgment was affirmed by the Court of Appeal of California, First Appellate District (hereinafter "the Court of Appeal").

As will be shown more fully below, the judgment and opinion of the Court of Appeal is erroneous for two reasons: (1) the Court of Appeal improperly applied the standard applicable in an action brought under the Federal Employers' Liability Act for determining whether the evidence requires submission of the issue of contributory negligence to the jury; and (2) the Court of Appeal incorrectly held that a trial court is not required to instruct the jury, in an action brought under the Federal Employers' Liability Act, that any award of damages to the plaintiff will not be subject to income taxation. This Court should determine these issues for the reasons, among others set forth below, that such issues are of substantial importance in the correct and uniform administration of the F.E.L.A., neither issue has yet been considered by this Court, and the decisions of other appellate courts are in substantial conflict concerning such issues. Accordingly, petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal. Petitioner respectfully shows as follows:

I.

OPINION BELOW

The opinion of the Court of Appeal is not reported, either officially or unofficially. It is set forth in Appendix A hereto. No opinion was rendered by any other court in connection with this case.

II.

JURISDICTION

The judgment and opinion of the Court of Appeal, the judgment sought to be reviewed herein, was entered and filed on January 27, 1977 (App. A). The Court of Appeal denied a timely petition for rehearing on February 18, 1977 by an order reproduced in Appendix B. A timely petition for a hearing in the California Supreme Court was denied on March 24, 1977 by an order reproduced in Appendix C. This petition was filed within 90 days of the date last mentioned and therefore is timely. (*American Railway Exp. Co. v. Levee* (1923) 263 U.S. 19, 20-21.) There has been no order granting an extension of time to petition for certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), for the reason that the questions presented in this petition are federal questions of substantial importance in the correct and uniform administration of the Federal Employers' Liability Act. (*Rogers v. Missouri P. R. Co.* (1957) 352 U.S. 500, 509; *Brown v. Western Railway of Alabama* (1949) 338 U.S. 294, 295.)

III.

QUESTIONS PRESENTED

A. The first question presented for review is whether the Court of Appeal improperly applied the standard applicable in an action brought under the Federal Employers' Liability Act for determining whether the evidence requires submission of the issue of contributory negligence to the jury.

B. The second question presented is whether, in an action brought under the Federal Employers' Liability Act,

the jury should be instructed that any award of damages to the plaintiff will not be subject to income taxation.

IV.

STATUTES INVOLVED

This action was tried under the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) and the Federal Safety Appliance Act (45 U.S.C. § 1 et seq.) The portions of the F.E.L.A. pertinent herein are 45 U.S.C. §§ 51 [35 Stat. 65, as amended 53 Stat. 1404] and 53 [35 Stat. 616]. The pertinent portion of the Federal Safety Appliance Act is 45 U.S.C. § 11 [36 Stat. 298]. Other statutes involved in the case are federal and state statutes establishing the nontaxability of awards of damages for personal injuries. (26 U.S.C. § 104 [68A Stat. 30, as amended 74 Stat. 847, 76 Stat. 829, 90 Stat. 1567, 1568, 1766]; Ore. Rev. Stat., § 316-062 [1969 C. 493 S. 14]; Cal. Rev. & Tax Code § 17138 [Stats. 1969, ch. 1607, § 4].) Another pertinent statute sets forth the California practice regarding exceptions to rulings of the trial court. (Cal. Code Civ. Proc. § 647 [Stats. 1963, ch. 99 § 1].) The cited statutes, none of which are drawn into question in this petition, are lengthy and are set out in Appendix D as pertinent.

V.

STATEMENT OF THE CASE

A. Material Facts.

Respondent brought this action to recover damages for personal injuries sustained by him while employed at petitioner's yard at Klamath Falls, Oregon. On the day of the accident, respondent was a member of a yard crew whose duties included switching railway cars among various tracks. On two separate occasions that day, respondent was

required to secure two particular railway cars at a certain point on a slightly inclined track. The method used to secure the cars, which had been in use for many years in the Klamath Falls yard and remains in use, was to "chock" the wheels. Chocking is accomplished by placing a two by ten piece of wood under one wheel. Respondent testified that one chock, if properly placed, ordinarily is sufficient to secure two railway cars. Respondent also testified that he successfully secured the two particular railway cars by this method when first required to do so. For reasons not material here, the two cars were later removed from the track by a locomotive and then returned to precisely the same location, where respondent was required to chock them a second time. Respondent attempted to do so by means of a chock which, he testified, was in good condition. On this occasion, however, the cars jumped the chock and began to roll. Respondent sustained an injury to his foot when he boarded one of the cars and attempted to stop them.

Petitioner contended at trial and on appeal that the evidence summarized above required submission of the issue of contributory negligence to the jury. That evidence showed that the method of chocking employed by respondent had long been in successful use; that one chock, if properly placed, ordinarily is sufficient to secure two railroad cars; that respondent, earlier in the day, successfully chocked the two cars responsible for his injury at the precise point from which they later commenced rolling; and that the chock used unsuccessfully by respondent on the second occasion was in good condition. Petitioner contended below, and contends again in this petition, that the foregoing evidence strongly suggests that respondent improperly and negligently chocked the cars on the second occasion and thereby contributed to his own injury.

Petitioner also argued at trial and on appeal that the jury should have been instructed that any award of damages made to respondent would not be subject to federal or state income taxation. Personal injury awards are excepted from federal income taxation. (26 U.S.C. § 104(a)(2).) Similarly, such awards are not taxable in California, where the action was tried, or in Oregon, where respondent resides. (Cal. Rev. & Tax Code § 17138(a)(2); Ore. Rev. Stat. § 316.062.) The described instruction was requested in order to prevent the jury from inflating any award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the award would be taxable.

B. Raising and Determination of the Federal Questions.

The federal questions presented in this petition were first raised in the trial court by means of a request to instruct the jury on the issues of contributory negligence and the non-taxability of the award. This request was made in the manner required by California procedure when petitioner tendered proposed instructions on these issues. These proposed instructions are set forth verbatim in Appendix E.[1] The refusal of the trial judge to give these instructions is noted on their face.[2] Petitioner did not take a specific

1. The proposed instructions are found at pages 251-254 and page 272 of the Clerk's Transcript.

The record in this case has not been transmitted to this Court. Record references are included in the event that a request for transmission is made by the clerk or by respondent pursuant to Supreme Court Rules, rule 21(1). All record references made in this petition, including appendices, are to the Clerk's Transcript ("Cl. Tr.") and the Reporter's Transcript ("Rep. Tr.") of the proceedings in the trial court.

2. The trial court gave the following reason for rejecting petitioner's request that the jury be instructed on contributory negligence: "I think there is no contributory negligence or no evidence from which an inference of contributory negligence is shown." (Rep. Tr. p. 322.) Moreover, the trial court specifically charged the jury as follows: "And you are not to consider the defense of contributory negligence, because there is no evidence to support it." (Rep. Tr. p. 420.)

In rejecting petitioner's proposed instruction concerning the nontaxability of the award, the trial court said only the following: "And I have never given an income tax one." (Rep. Tr. p. 316.)

exception to the trial court's ruling, since a refusal to instruct is deemed automatically excepted to in California practice. (Cal. Code Civ. Proc. § 647 [App. D].) Accordingly, the federal questions presented in this petition were adequately raised and preserved for the purpose of obtaining appellate review.

After a timely notice of appeal was filed (Cl. Tr. 415), the same questions were presented to the Court of Appeal by record and briefs, and were again resolved adversely to petitioner. The court's resolution of the contributory negligence issue is shown at pages 3-7 of its opinion (App. A). The opinion states, as the general rule applicable in F.E.L.A. actions, that the "slightest evidence" of contributory negligence is sufficient to take the matter to the jury. The opinion further states, however, that there was *no evidence* in the case from which the jury could reasonably have inferred that respondent was contributorily negligent. In rejecting petitioner's contention, previously discussed, that the evidence strongly suggested that respondent failed properly to chock the railway cars prior to his injury, the Court of Appeal said the following: "The inference suggested by [petitioner] is mere speculation; it could as well be surmised that the chock supplied by [petitioner] was defective or that the failure of the chock to stop the cars was due to some other cause not connected with negligence on the part of respondent" (App. A, p. 5). As is shown in the record and was pointed out in the petition for rehearing, however, respondent himself testified that the chock used just prior to the accident was in good condition.

The Court of Appeal further stated in its opinion that any error of the trial court in refusing to instruct on contributory negligence would not require reversal (App. A, pp. 5-7). As is set forth in the opinion, two causes of action were involved in this case: one cause of action was under the F.E.L.A., alleging negligence on the part of petitioner, and the other was under the Federal Safety Appliance Act, alleging an inefficient handbrake. Contributory negligence is not a defense to an action brought under the latter act. The Court of Appeal stated that, since the jury rendered a general verdict and petitioner did not request a special verdict, it could not be determined upon which cause of action the jury based its decision. This, the court said, invoked the rule of California procedure that where a general verdict is rendered, the fact that one issue is affected by error will be immaterial where other issues are not affected by error and where the evidence regarding such other issues would support the verdict.

The Court of Appeal further held that it was not error for the trial court to refuse to give an instruction regarding the non-taxability of the award (App. A, pp. 9-11). This conclusion was supported by reference to California cases holding that such an instruction is not required in personal injury actions tried in the state courts. The Court of Appeal also said the following: "Moreover, there is no clear federal rule, even as to cases tried in federal courts. *The United States Supreme Court has not ruled on the question, and the lower federal courts are divided on the matter* (citations)" (App. A, p. 11 (emphasis added)).

VI.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari for the reason that the Court of Appeal has decided federal questions

of substance in a way not in accord with decisions of the federal courts and for the further reason that such issues have not previously been determined by this Court.[3] (Supreme Court Rules, rule 19(a).)

A. The Court of Appeal Incorrectly Applied the Standard Applicable in an F.E.L.A. Action for Determining Whether the Evidence Requires Submission of the Issue of Contributory Negligence to the Jury.

According to the lower federal courts, the sufficiency of the evidence to take the issue of contributory negligence to the jury in actions brought under the Federal Employers' Liability Act is to be tested by the same standard that is used to test the sufficiency of the plaintiff's evidence on the issues of negligence and proximate cause. (*Page v. St. Louis Southwestern Railway Co.* (5th Cir. 1965) 349 F.2d 820, 823-824; *Ganotis v. New York Central Railroad Co.* (6th Cir. 1965) 342 F. 2d 767, 768; *Mumma v. Reading Co.* (E.D. Pa. 1965) 247 F. Supp. 252, 254.) That standard, which is considerably more liberal than that applicable in common law negligence actions, has been described by this Court as follows: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence the jury may also with reason, on grounds of probability, attribute the result to other causes, including the

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3. Petitioner has omitted to raise herein its contention, argued below (see App. A, pp. 7-9), that the trial court committed prejudicial error in admitting certain testimony of an expert which constituted an improper conclusion of law concerning the alleged violation by petitioner of the Federal Safety Appliance Act. Petitioner intends to raise this issue before this Court if certiorari is granted.

employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." (*Rogers v. Missouri P. R. Co.* (1957) 352 U.S. 500, 507 (emphasis added).)

In a variety of cases, this Court has demonstrated its willingness to grant certiorari where necessary to enforce correct application of the quoted standard in F.E.L.A. actions tried in the state courts. (see, e.g., *Gallick v. Baltimore and Ohio Railroad Company* (1963) 372 U.S. 108; *Webb v. Illinois Central Railroad Company* (1957) 352 U.S. 512; *Lavender v. Kurn* (1945) 327 U.S. 645; *Tennant v. Peoria & Pekin Union Railway Co.* (1943) 321 U.S. 29; see also *Pehowic v. Lackawanna Railroad Company* (3rd Cir. 1970) 430 F. 2d 697, 699 fn. 2 [stating that Supreme Court will summarily reverse when *Rogers* standard violated and citing per curiam reversals].) Moreover, this Court has made clear that the jury in an F.E.L.A. action may be permitted to engage in a measure of speculation and conjecture and should not be prevented from determining the case merely because factors other than negligence may have caused the occurrence. (*Webb v. Illinois Central Railroad Co., supra,* 352 U.S. 512, 513 fn. 6; *Lavender v. Kurn, supra,* 327 U.S. 645, 653.)

In the case at bench, respondent sustained injury after he attempted unsuccessfully to secure two railway cars by chocking the wheels. As has been argued previously, the evidence relating to the occurrence gives rise to a clear and reasonable inference that respondent negligently and improperly chocked the cars and thereby contributed to his own injury. Although the evidence supporting this conclu-

sion is largely circumstantial, such evidence is sufficient to take the matter to the jury. (*Rogers v. Missouri P. R. Co., supra,* 352 U.S. 500, 508.) The Court of Appeal fundamentally erred when it held that the suggested inference is too speculative to permit the issue to go to the jury. (App. A, p. 5.)

As has been stated above, various lower courts have concluded that the standard established in *Rogers, supra,* and related cases for testing the sufficiency of the plaintiff's case on negligence and proximate cause is also applicable to the defendant's evidence of contributory negligence. This conclusion is a logical consequence of the comparative negligence system embodied in the F.E.L.A. (see *Page v. St. Louis Southwestern Railway Co., supra,* 349 F. 2d 820, 824.) This Court, however, has never ruled on the matter. Moreover, there is significant confusion among the authorities. At least one state appellate court has held that the common law test of proximate cause, while not applicable to the employee's case on negligence, is applicable where the employer contends that the employee was contributorily negligent. (*Missouri-Kansas-Texas R.R. Co. v. Shelton* (Tex. Civ. App. 1964) 383 S.W. 2d 842, 846, cert. den. 382 U.S. 845.) Since this is a question of substantial importance in the uniform administration of the Federal Employers' Liability Act, this Court should make a clarifying rule concerning the manner and circumstances in which the issue of contributory negligence should be submitted to the jury under the Act.

As has been stated previously, the Court of Appeal indicated in its opinion that any error of the trial court in refusing to instruct on contributory negligence would have been immaterial. The opinion refers to the rule of California procedure giving effect to general verdicts in cases

where more than one count or issue exists and not all are affected by error. Petitioner contends that such a resolution of the matter of prejudice is illegitimate, since it results in the denial of petitioner's right to a jury trial on all issues in the case. The right to a jury trial is a right conferred by the Federal Employers' Liability Act and it cannot be defeated by local forms of practice. (*Brown v. Western Railway of Alabama, supra,* 338 U.S. 294, 296; *Bailey v. Central Vermont Railway Inc.* (1942) 319 U.S. 350, 354.) This doctrine is reinforced in the present case by the fact that the rule here in issue has been denounced as "unbelievable" for the reason, among others, that it sanctions the rendition of illegal verdicts. (1 Stanbury, *California Trial and Appellate Practice* (1958) § 622, pp. 681-685.)

B. The Decision Below Incorrectly Holds That, in an F.E.L.A. Action, the Jury Need Not Be Instructed as to the Non-Taxability of the Award.

The Court of Appeal applied the California rule that, in a personal injury action, the jury need not be instructed that any award of damages to the plaintiff will be non-taxable. In so holding, the Court of Appeal relied in large measure upon the fact that no clear federal rule exists concerning the defendant's right to such an instruction in an action brought under the Federal Employers' Liability Act.

In *Burlington Northern, Inc. v. Boxberger* (1975) 529 F. 2d 284, the U.S. Court of Appeals for the Ninth Circuit held that an income tax instruction of the nature here at issue, at least where appropriately requested, must be given in a personal injury action brought under the F.E.L.A. (Id. at 295-298.) A similar holding was made by the Third Circuit in an action for personal injuries brought by a longshoreman. (*Domeracki v. Humble Oil & Refining Co.* (1971)

443 F. 2d 1245, cert. den. 404 U.S. 883.) In other circuits, however, the refusal of a trial judge to give an instruction of the described nature has been upheld. (*Nichols v. Marshall* (10th Cir. 1973) 486 F. 2d 791 [diversity action]; *Greco v. Seaboard Coast Line Railroad Company* (5th Cir. 1972) 464 F. 2d 496, cert. den. 410 U.S. 990 [F.E.L.A. action]; *McWeeney v. New York, New Haven and Hartford Railroad Company* (2d Cir. 1960) 282 F. 2d 34, 39, cert. den. 364 U.S. 870 [F.E.L.A. action]; *Payne v. Baltimore and Ohio Railroad Company* (6th Cir. 1962) 309 F. 2d 546 [F.E.L.A. action].) The Eighth Circuit has expressly declined to rule on the issue. (*Rouse v. Chicago Rock Island and Pacific Railroad Company* (8th Cir. 1973) 474 F. 2d 1180 [F.E.L.A. action]; *Raycraft v. Duluth, Missabe and Iron Range Railway Company* (8th Cir. 1973) 472 F.2d 27 [court stated, in an F.E.L.A. action, that "[t]he question is more properly left open for future consideration and perhaps for *en banc* determination by the entire Court."].) Accordingly, the decisions of the federal circuits are in conflict on this issue.

The reason for informing juries of the non-taxability of awards, as described by *Boxberger* and *Domeracki* courts, is that contemporary juries are "tax conscious" and therefore are likely to inflate damage awards in order to compensate the plaintiff for the presumed effect of income taxation. That this may have occurred in the case at bench is suggested by the fact that the award ($460,575.13) is significantly out of proportion to respondent's impaired earning capacity and other loss as established by the evidence.

This issue is of substantial importance in the uniform administration of the Federal Employers' Liability Act. Since different rules prevail among the lower federal courts, inconsistency in the size of damage awards probably

exists. Moreover, confusion exists in the Ninth Circuit, where some state trial courts apparently follow the rule of *Boxberger, supra,* and others do not. In order to avoid such confusion and consequent forum-shopping among the federal and state trial courts, this Court should establish a uniform federal rule requiring that juries be informed of the non-taxability of personal injury awards and should make such a rule applicable in all actions brought under the Federal Employers' Liability Act.

VII.

CONCLUSION

For the reasons presented above, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal, First Appellate District.

B. CLYDE HUTCHINSON
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(Appendices Follow)

Appendix A

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

In the Court of Appeal of the State of California
First Appellate District, Division Four

1/Civil 38036
(Superior Court No. 654557)

Ronald Dean Johnson,
Plaintiff and Respondent,

vs.

Southern Pacific Transportation Company, a corporation,
Defendant and Appellant.

Southern Pacific Transportation Company appeals from a judgment rendered on a jury verdict which awarded $460,578.13 to respondent Ronald Dean Johnson on causes of action under the Federal Employers' Liability Act (45 U.S.C., § 51 et seq.) and the Federal Safety Appliance Act (45 U.S.C., § 11).

Respondent was injured while working in appellant's Klamath Falls, Oregon, yard. Respondent was a member of a yard crew of four men whose duties were to switch railroad cars among various repair tracks. Respondent's specific job was that of "fieldman," with the responsibility to guide the cars in outlying areas of the track complex according to directions from the foreman. On the day of the accident, respondent had a "switch list," identifying the location of various railroad cars and giving directions for their placement by the crew. The crew's main task was to transfer several repaired cars from one to another track

and thereafter to place on the repair track certain additional railroad cars which needed work.

During the course of these operations, respondent had under his charge a 150,000-pound bulkhead flatcar and a railroad boxcar which were coupled together on a slightly inclined track. Respondent placed a chock under the wheels of the flatcar, but the car rolled over the chock and continued to move. Respondent attempted to place chocks two more times but the cars kept rolling. Respondent therefore boarded the bulkhead flatcar in order to brake it and thus prevent the flatcar and boxcar from colliding with other railroad cars which were standing on the track. This action conformed to appellant's rules which required employees to attempt to protect appellant's property.

The bulkhead flatcar, as the name implies, was provided with a bulkhead approximately 8 feet high at each end perpendicular to the bed of the car. The brakes were designed to be actuated by a shaft at one end of the car, perpendicular to the bed, approximately 4 feet tall with a horizontal wheel mounted on top of the shaft. The brakes are tightened by turning the wheel in a clockwise direction.

Respondent placed his left foot inside the bulkhead on a ledge 2 inches in width, and his right foot on the bulkhead sill. No footing more secure than that selected by respondent was available. Normally it is necessary to use two hands to operate this type of brake.

Respondent moved the wheel clockwise in an attempt to apply the brake, but the wheel moved only half a turn and then stuck. While respondent was struggling to move the brake, it suddenly came free and spun around, throwing him off balance. Respondent fell down between the two cars, and his foot was crushed. Permanent disability and continuing severe pain resulted from the injury.

Appellant contends that the trial court erred in refusing to submit the issue of respondent's contributory negligence to the jury.

"A railroad has a non-delegable duty to provide its employees with a reasonably safe place to work, Shenker v. Baltimore and O. R. Co., 374 U.S. 1 [1963]. Under the [Federal Employers' Liability] Act, an employer is liable if the injury was caused in whole or in part by its negligence." (*Pehowic v. Erie Lackawanna Railroad Co.* (3d Cir. 1970) 430 F.2d 697, 699.) Contributory negligence is not a defense under the F.E.L.A. but is considered in diminution of damages (45 U.S.C., § 53; *Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500, 505, fn. 9; *Tiller v. Atlantic Coast Line Railroad Co.* (1943) 318 U.S. 54; *Patterson v. Norfolk and Western Railway Co.* (6th Cir. 1973) 489 F.2d 303, 306; *Ganotis v. New York Central Railroad Co.* (6th Cir. 1965) 342 F.2d 767, 768).

Appellant had the burden of proof on the issue of contributory negligence (see *Dixon v. Penn. Central Co.* (1973) 481 F.2d 833, 837; *Mumma v. Reading Co.* (E.D.Pa. 1965) 247 F.Supp. 252, 254). But the sufficiency of the evidence to take the issue of contributory negligence to the jury is to be tested by the same liberal standards that are used to test the sufficiency of plaintiff's evidence on the issues of negligence and proximate cause. (*Page v. St. Louis Southwestern Railway Co.* (5th Cir. 1965) 349 F.2d 820, 824; *Ganotis v. New York Central Railroad Co., supra,* 342 F.2d 767, 768-769; *Mumma v. Reading Co., supra,* 247 F.Supp. 252, 254; but see *Missouri-Kansas-Texas R. R. Co. v. Shelton* (Tex. 1964) 383 S.W.2d 842, 846, cert. den. 382 U.S. 845.)

The slightest evidence of negligence or causation is sufficient to take the case to the jury under the F.E.L.A.:

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence. (Emphasis added.)

(*Rogers v. Missouri Pacific R. Co., supra,* 352 U.S. at pp. 506-507; see *Metcalfe v. Atchison, T. & S.F. Ry. Co.* (1974) 491 F.2d 892, 895, 897; *Pehowic v. Erie Lackawanna Railroad Co., supra,* 430 F.2d 697, 699; *Colorado and Southern Railway Co. v. Lombardi* (Col. 1965) 400 P.2d 428, 430; *Seaboard Coast Line Railroad Co. v. McDaniel* (Ala. 1975) 321 S.2d 664, 667-668.)

Appellant's major argument in support of its position that the issue of contributory negligence should have been submitted to the jury is that respondent testified that one wooden chock usually would be sufficient to hold two railroad cars. It is argued that the jury could reasonably have inferred from this testimony that the flatcar began rolling because respondent had negligently failed to place the chock properly.

An inference of contributory negligence must be based on more than suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork. (See *Metcalfe v. Atchison, T. & S.F. Ry. Co., supra,* 491 F.2d 892, 896; *Mason v. Mathiasen Tanker Inds., Inc.* (4th Cir. 1962) 298 F.2d 28; see *Mize v. Atchison, T. & S.F. Ry. Co.* (1975) 46 Cal. App.3d 436, 454.) "Contributory negligence, where it applies, is a matter requiring proof by the party relying thereon, unless the testimony of the plaintiff tenders that issue." (*Ballard v. Sacramento Northern Ry. Co.* (1932) 126 Cal.App. 486, 496.) The inference suggested by appellant is mere speculation; it could as well be surmised that the chock supplied by appellant was defective, or that the failure of the chock to stop the cars was due to some other cause not connected with any negligence on the part of respondent.

Moreover, if it had been error to refuse an instruction on contributory negligence, reversal is not required. There were two separate and distinct causes of action involved in this case: one cause of action was under the Federal Employers' Liability Act, alleging negligence on the part of Southern Pacific in failing to provide a reasonably safe place to work (45 U.S.C., § 51), and the other cause of action was under the Federal Safety Appliance Act, alleging an inefficient hand brake (45 U.S.C., § 11). The jury was instructed on both theories and it rendered a general verdict in favor of respondent. Appellant did not ask for special verdicts; thus, the basis of the jury's decision cannot be established.

As stated in *Rather v. City & County of San Francisco* (1947) 81 Cal.App.2d 625, 636, "a general verdict imports findings in favor of the prevailing party on all material issues, and if upon such a verdict one issue alone is sus-

tained by the evidence and is not affected by any error, the want of evidence to sustain the finding on the other issues or any errors committed in regard to them cannot be prejudicial." (Quoting 2 Cal.Jur., at p. 1029; see *Berger v. Southern Pac. Co.* (1956) 144 Cal.App.2d 1, 5-6; *King v. Schumacher* (1939) 32 Cal.App.2d 172, 178-180; *Edgington v. Southern Pac. Co.* (1936) 12 Cal.App.2d 200, 206; *Walton v. Southern Pac. Co.* (1935) 8 Cal.App.2d 290, 305; see also *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673; *Codekas v. Dyna-Lift Co.* (1975) 48 Cal.App.3d 20, 24-25; *Cross v. Ryan* (7th Cir. 1941) 124 F.2d 883, 887.) Here, the evidence would sustain the general verdict on the basis of a violation of the Federal Safety Appliance Act (see *Myers v. Reading Co.* (1947) 331 U.S. 447, 482-485) even if it had been error, as to the F.E.L.A. cause of action, to refuse an instruction on contributory negligence.

Contributory negligence is not a defense to an action for violation of the Federal Safety Appliance Act, and it has no place in such a case. (See 45 U.S.C., § 53; *Myers v. Reading Co., supra; Rogers v. Missouri Pacific R. Co., supra,* 352 U.S. 500, 507, fn. 13; *Metcalfe v. Atchison, T. & S.F. Ry. Co., supra,* 491 F.2d 892, 895; *McCarthy v. Pennsylvania R. Co.* (7th Cir. 1946) 156 F.2d 877, 880; see also *Leet v. Union Pacific R.R. Co.* (1943) 60 Cal.App.2d 814, 818; *Ballard v. Sacramento Northern Ry. Co., supra,* 126 Cal.App. 486, 497; *Feigl v. Terminal Railroad Ass'n of St. Louis* (Ill. 1975) 332 N.E.2d 416, 422.)

The statutory liability which is imposed for a violation of the Federal Safety Appliance Act is not based on a railroad's negligence; it is an absolute duty and the railroad is not excused by a showing of care. (*Myers v. Reading Co., supra,* 331 U.S. at p. 482.)

A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries was on a car which the railroad was then using on its line, in interstate commerce, and that the brake was not an "efficient" hand brake. Furthermore—

> "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner." *Didinger v. Pennsylvania R. Co.,* 39 F. 2d 798, 799.
>
> "Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Philadelphia & R. R. Co. v. Auchenbach,* 3 Cir., 16 F. 2d 550. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. . . .

(*Myers, supra,* at pp. 482-483; see *Phillips v. Chesapeake and Ohio Ry. Co.* (1973) 475 F.2d 22, 25.) The evidence is sufficient in the present case to sustain the general verdict on the theory of a violation of the Federal Safety Appliance Act, which was submitted to the jury without error.

Appellant contends that the trial court erred as to the cause of action under the Federal Safety Appliance Act in admitting the testimony of James Suetta, a car inspector

for Southern Pacific. Appellant argues that Suetta expressed certain legal and factual conclusions in his testimony which invaded the provinces of the court and jury.

The Federal Safety Appliance Act provides that "All cars must be equipped with . . . efficient hand brakes; . . ." (45 U.S.C., § 11), and the applicable federal regulation relating to flatcars provides that "Each hand brake shall be so located that it can be *safely operated while car is in motion.*" (Code Fed. Regs., tit. 49, pt. 231, § 231.6(a)(3)(i); emphasis added.) Suetta gave his opinion that the hand brakes were not located so as to be capable of safe operation while the car was in motion. The witness stated the factual basis and reasons for that opinion.

In *Beanland v. Chicago, Rock Island & Pacific R.R. Co.* (8th Cir. 1973) 480 F.2d 109, 116, the court stated:

> . . . competent expert testimony is generally admissible in cases involving the operations of a railroad which necessarily involve facts peculiar to such railroading. Such cases represent specific applications of the general rule enunciated in the case of Associated Dry Goods Corp. v. Drake, 394 F.2d 637, 644 (8th Cir. 1968), to-wit:
>
> "It is the general rule that expert testimony is appropriate when the subject of inquiry is one which jurors of normal experience and qualifications as laymen would not be able to decide on a solid basis without the technical assistance of one having unusual knowledge of the subject by reason of skill, experience, or education in the particular field." *See also* Schillie v. Atchison, T. & S. F. Ry., 222 F.2d 810, 815 (8th Cir. 1955).

(See Evid. Code, §§ 801, 805; Fed. Rules of Evid. 701, 702, 704; *Jablonowski v. United States* (E.Dist.Pa. 1964) 230 F. Supp. 740, 743; *Hawkins v. Missouri Pac. R. Co.* (8th Cir. 1951) 188 F.2d 348, 351; *Haines v. Reading Co.* (3d Cir. 1950) 178 F.2d 918; *Detroit T. and I.R. Co. v. Banning* (6th Cir. 1949) 173 F.2d 752, 756; *Atchison, T. & S.F. Ry. Co. v. Simmons* (10th Cir. 1946) 153 F.2d 206, 208-209; see also *Dyas v. Kansas City Southern Ry. Co.* (5th Cir. 1970) 425 F.2d 1073, 1074; *Atlantic Coast Line R. Co. v. Sweat* (5th Cir. 1950) 183 F.2d 27, 28-29.) The trial court did not abuse its discretion in admitting Mr. Suetta's testimony.

Appellant contends that the trial court erred in failing to instruct the jury that any award to respondent would not be subject to income tax. The following instruction was requested by appellant:

> Any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of either the Federal or State Income Tax Law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this court in measuring those damages, and in no event should you either add to or subtract from that award on account of Federal or State Income Taxes.

California and the majority of courts which have considered the subject have held that it is not error for the trial court to refuse to give an instruction on the subject of income taxes (*Henninger v. Southern Pac. Co.* (1967) 250 Cal.App.2d 872, 878-880 [F.E.L.A. case]; *Atherley v. MacDonald, Young & Nelson* (1956) 142 Cal.App.2d 575, 589; see also *Plourd v. Southern Pac. Transportation Co.* (Ore. 1973) 513 P.2d 1140, 1147). In *Henninger v. Southern Pac. Co., supra,* the court stated (250 Cal.App.2d at pp. 879-880):

> In the only case to reach our appellate courts on the issue here presented, California has sided with the

majority. (*Atherley v. MacDonald, Young & Nelson,* 142 Cal.App.2d 575, 589 [298 P.2d 700].) In *Atherley* this court held that it was not error to refuse to give an instruction to the effect that an award of damages in a personal injury case is not subject to federal or state income taxes. In its opinion the court pointed out that the jury had been instructed on the subject of damages and ". . . was told that it could award compensatory damages only, that is, those damages which would fairly compensate plaintiff for his pecuniary loss. The items of recoverable damage were itemized. The court specifically directed that 'speculative,' or 'conjectural,' or 'remote' damages could not be recovered." Our case is similar. The various elements of special damages were described by the court in its instructions, including damages for medical treatment, hospitalization and attendance, as well as lost earnings and lost earning power. General damages for pain and suffering were also mentioned. The court specifically instructed the jury to award compensatory damages only. No mention was made of taxes of any kind or nature and, if the jury followed the court's instructions as we must presume they did, the award includes nothing to compensate respondent for any supposed loss because of income taxes, but on the contrary, includes only such items of damage as the court described in detail in its instructions. As will later appear, the award itself is well within the range of respondent's evidence.

The F.E.L.A. creates federal rights protected by federal law and as to the propriety of jury instructions defining the cause of action and the measure of damages, federal decisions are controlling (*Dugas v. Kansas City Southern Ry. Lines* (5th Cir. 1973) 473 F.2d 821, 826-827, cert. den. 414 U.S. 823). But the requested instruction does not affect either the definition of a cause of action under the F.E.L.A.

or the measure of damages; it is a matter of general advice which may be thought useful for the purpose of heading off improper speculation on the taxability of a verdict. The giving of such an instruction by a state court is not a requirement of federal law. Moreover, there is no clear federal rule, even as to cases tried in federal courts. The United States Supreme Court has not ruled on the question, and the lower federal courts are divided on the matter (see *Burlington Northern, Inc. v. Boxberger* (9th Cir. 1975) 529 F.2d 284, 296-297; *Rouse v. Chicago, Rock Island & Pacific R.R. Co.* (8th Cir. 1973) 474 F.2d 1180, 1183). It was not error to refuse the requested instruction.

Appellant's final contention is that the trial court erred in excluding evidence of alternate employment opportunities. Appellant contends that the excluded evidence would have shown that respondent had not taken reasonable steps to mitigate his damages.

An injured claimant is required to make a reasonable effort to mitigate his damages; this includes a duty to seek reasonable alternative employment which he is capable of performing. (*McGinley v. United States* (1971) 329 F.Supp. 62, 66.) In the present case, respondent secured employment as a janitor in April 1973, apparently as soon as he was physically able to perform such work. Respondent was still employed as a janitor at the time of trial, and made no claim that he would be totally unemployable in the future.

Appellant offered to prove that respondent had turned down other employment opportunities offered him by appellant. The offer of proof failed to establish, however, any firm or specific job offer on its part to respondent. In fact, it did not even show that it had employment available and was willing to employ respondent. It was not error to

reject this speculative and insubstantial offer of proof. (See generally, *Zimmerman v. Montour R.R. Co.* (W.Dist. Pa. 1961) 191 F.Supp. 433, 434.)

The judgment is affirmed.

Christian, J.

We concur:

Caldecott, P. J.

Rattigan, J.

Filed, January 27, 1977
Clifford C. Porter, Clerk

Appendix B

Court of Appeal of the State of California
in and for the
First Appellate District

Division Four

No. 38036

Ronald Dean Johnson,
Plaintiff and Respondent,

vs.

Southern Pacific Transportation Company,
Defendant and Appellant.

BY THE COURT:

The petition for rehearing filed in the above entitled case is hereby denied.

Dated February 18, 1977

Filed February 18, 1977
Clifford C. Porter, Clerk

Caldecott P.J.

Appendix C

ORDER DENYING HEARING AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, Civil No. 38036

In the Supreme Court of the State of California
In Bank

Johnson

v.

Southern Pacific Transportation Company, etc.

Appellant's petition for hearing DENIED.

Tobriner
Acting Chief Justice

Filed, March 24, 1977
G. E. Bishel, Clerk

Appendix D

STATUTES INVOLVED

45 U.S.C. § 51 provides:

"Every common carrier by railroad while engaging in commerce between any of the several States of Territories or between any of the States and Territories, or between the District of Columbia and any of the States of Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

45 U.S.C. § 53 provides:

"In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the

fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

45 U.S.C. § 11 provides:

"It shall be unlawful for any common carrier subject to the provisions of sections 11 to 16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

26 U.S.C. § 104 provides, in pertinent part:

"(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

. . . (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness; . . ."

Oregon Revised Statutes, § 316.062 provides:

"The entire taxable income of a resident of this state is his federal taxable income as defined in the laws of the United States, with the modifications, additions and subtractions provided in this chapter."

California Revenue and Taxation Code, § 17138 provides, in pertinent part:

"(a) Except in the case of amount attributable to (and not in excess of) deductions allowed under Sections 17253 to 17258 inclusive (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

. . . (2) The amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness; . . ."

California Code of Civil Procedure § 647 provides, in pertinent part:

"All of the following are deemed excepted to: . . . refusing to give an instruction . . ."

Appendix E

PETITIONER'S PROPOSED JURY INSTRUCTIONS

DEFENSE INSTRUCTION NO. 12

BAJI 11.19

FELA—DEFINITION OF CONTRIBUTORY NEGLIGENCE

Contributory negligence is negligence on the part of a plaintiff which combining with the negligence of a defendant, contributes as a proximate cause in bringing about the injury.

GIVEN ..... s/Lawrence S. Mana
GIVEN AS MODIFIED ..... [Judge]
REFUSED .....✓..... [Cl. Tr. 251]

DEFENSE INSTRUCTION NO. 13

BAJI 11.21

FELA—EFFECT OF CONTRIBUTORY NEGLIGENCE

Contributory negligence, if any, on the part of the plaintiff does not bar a recovery by plaintiff against the defendant Southern Pacific Transportation Company, but the total amount of damages to which the plaintiff would otherwise be entitled against that defendant shall be reduced by you in proportion to the amount of negligence attributable to the plaintiff.

GIVEN ..... s/Lawrence S. Mana
GIVEN AS MODIFIED ..... [Judge]
REFUSED .....✓..... [Cl. Tr. 252]

DEFENSE INSTRUCTION NO. 14

BAJI 11.22

FELA—DIMINUTION OF DAMAGES BECAUSE OF CONTRIBUTORY NEGLIGENCE

Thus, if you find that plaintiff's injury was proximately caused by a combination of contributory negligence of the plaintiff and negligence of the defendant employer, you shall determine the amount of damages to be awarded by you as follows:

First: Determine the total amount of damages to which plaintiff would be entitled under the court's instructions if plaintiff had not been guilty of contributory negligence;

Second: Determine what percentage of the total combined negligence of defendant employer and plaintiff which proximately caused the injury consisted of the plaintiff's negligence; and

Third: Then reduce the total amount of plaintiff's damages by that percentage.

GIVEN ..... s/Lawrence S. Mana
GIVEN AS MODIFIED ..... [Judge]
REFUSED .....✓..... [Cl. Tr. 253]

DEFENSE INSTRUCTION NO. 15

BAJI 11.23

FELA—METHOD TO DIMINISH DAMAGES BECAUSE OF CONTRIBUTORY NEGLIGENCE

For the purpose only of illustrating how to apply the law that requires a proportional reduction of damages in the event of a finding that both the defendant and the plaintiff were guilty of negligence which contributed as a proximate cause to plaintiff's injury, let us assume that a jury in a case similar to this one has made such findings.

Its next step would be to determine that amount of damages to which the plaintiff would be entitled under the court's instructions, if the factor of contributory negligence were not present and the other necessary elements of liability were present. Let us call that amount "X dollars".

The jury next would be required to view as a combined effect the negligence of the defendant and the negligence of the plaintiff which were proximate causes of the injury. Then, with that combined negligence in mind, the jury would determine what portion of it, in fraction or percentage, consisted of plaintiff's own conduct.

If, in the jury's judgment, one-half of such combined negligence was plaintiff's then it would award plaintiff only half of X dollars. If two-thirds of such negligence was plaintiff's, then the jury would award plaintiff only one-third of X dollars. If one-third of such negligence was plaintiff's, then the jury would award plaintiff two-thirds of X dollars.

You will bear in mind that in giving you this illustration, to be considered only in the event that your findings would make it appropriate I do not mean to convey any sugges-

tion whatsoever as to what your verdict should be, whether or the plaintiff or the defendant, or, if for the plaintiff, in what amount.

GIVEN ..... s/Lawrence S. Mana
GIVEN AS MODIFIED ..... [Judge]
REFUSED .....✓..... [Cl. Tr. 254]

DEFENDANT'S INSTRUCTION 31

Any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of either the Federal or State Income Tax Law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this court in measuring those damages, and in no event should you either add to or subtract from that award on account of Federal or State Income Tax.

Internal Revenue Code, § 104, (1954)
Revenue & Taxation Code, § 17138
Domeracki v. Humble Oil & Refining Co. 443 F. 2d 1245, 1248-1249 (3d Cir. 1971), *Cert. Denied,* 404 U.S. 883 (1972)
Anderson v. United Airlines, Inc. 183 F. Supp. 97 (S.D. Cal. 1960)
Towli v. Ford Motor Co., 30 App. Div. 2d 319, 292 N.Y.S. 2d 8
Adams v. Deur, 173 N.W. 2d 100
Stager v. Florida East Coast Rwy. Co., 163 So. 2d 15, 18 (1963) [F.E.L.A. Case]
Porier v. Sherman, 129 So. 2d 439 (Fla. 1961)
Brooks v. U.S., 273 F.S. 619, 629
2 Witkin, *Summary of California Law,* § 408, p. 1612

s/Lawrence S. Mana

.....
Judge

GIVEN .....
REFUSED .....✓.....
MODIFIED ..... [Cl. Tr. 272]

CERTIFICATE OF SERVICE

I certify that I am a member of the bar of the Supreme Court of the United States; that I am counsel in this matter for petitioner Southern Pacific Transportation Company; and that the names and post office addresses of counsel of record for respondent are as follows:

Leo M. O'Connor
O'Connor, Sevey & Gessford
629 J Street
Sacramento, California 95814

Leonard Sacks
15910 Ventura Boulevard
Suite 1833
Encino, California 91436

I further certify that on this 16th day of June, 1977, I served three copies of the foregoing petition for certiorari upon the first-named counsel for respondent by enclosing them in a sealed envelope and depositing that envelope in a United States mail box in San Francisco, California, with first class postage thereon prepaid and addressed to said counsel as set forth above; and that on the same date I served three copies of the foregoing petition for certiorari upon the second-named counsel for respondent by enclosing them in a sealed envelope and depositing that envelope in a United States mail box in San Francisco, California, with air mail postage thereon prepaid and addressed to said counsel as set forth above. I further certify that all ~~persons~~ parties required to be served have been served.

B. CLYDE HUTCHINSON
Attorney for Petitioner Southern Pacific Transportation Company